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S.C., Appellant)	
)	Docket No. 16-1898
and)	Issued: April 4, 2017
)	
DEPARTMENT OF THE NAVY, MARINE)	
CORP BASE DISPENSARY CAMP YERMO,)	
Barstow, CA, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On September 27, 2016 appellant filed a timely appeal of a June 15, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

The issue is whether OWCP met its burden of proof to reduce appellant's wage-loss compensation benefits based on his capacity for earnings in the constructed position of manager-merchandise.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 21, 2011 appellant, then a 57-year-old heavy mobile equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that he injured his shoulders and lower back opening fire doors on September 19, 2011. The initial medical evidence dated September 19, 2011 diagnosed sprained shoulders. In a September 29, 2011 note, Dr. Jayaraja Yogaratnam, an orthopedic surgeon, noted that appellant reported injury to both shoulders and his lower back. He also noted that appellant had a prior low back injury on March 29, 2011, but was discharged for treatment for this condition on August 18, 2011. Dr. Yogaratnam diagnosed bilateral shoulder pain and lower back pain. Dr. Khaled Sanadiki, a Board-certified pediatrician, diagnosed shoulder sprains on October 31, 2011. OWCP accepted his claim for acromioclavicular (AC) sprain and sprain of the shoulders and upper arms as well as bilateral calcifying tendinitis on November 9, 2011.²

Dr. Rajiv Puri, a Board-certified orthopedic surgeon, examined appellant on January 23, 2012 and diagnosed right rotator cuff tears, left tendinitis and herniated disc L4-5. He performed authorized arthroscopy subacromial decompression of appellant's right shoulder on November 8, 2012. In a note dated April 8, 2013, Dr. Puri diagnosed tendinitis of the shoulders and herniated disc in the lumbar spine.

The employing establishment terminated appellant's employment on April 30, 2012.

Dr. James Matiko, a Board-certified orthopedic surgeon, examined appellant on August 8, 2013 and noted his history of injury. He noted appellant's complaints of left shoulder pain and lumbar spine injury on March 29, 2011. Dr. Matiko reviewed appellant's left shoulder magnetic resonance imaging (MRI) scan and diagnosed AC joint arthritis, superior labrum anterior to posterior (SLAP) lesion, and partial thickness tearing of both supraspinatus and subscapularis tendons. He recommended left shoulder surgery.

OWCP referred appellant for a second opinion evaluation with Dr. Ronnie Ghazal, a Board-certified orthopedic surgeon. The SOAF provided to Dr. Ghazal noted the accepted conditions and the date of injury. Dr. Ghazal reviewed appellant's history on May 3, 2013 noting that he had been discharged from care for an August 18, 2011 lumbar spine injury, and that he had previously sustained a right shoulder injury in 2010. Appellant was also on light duty due to a chemical reaction. During this examination, he reported that his back was most painful, but Dr. Ghazal indicated that he was not addressing this aspect of appellant's claim. Dr. Ghazal performed a physical examination, reviewed appellant's medical records and test results and diagnosed rotator cuff tendinopathy of the left shoulder and continued mechanical symptoms and rotator cuff weakness of the right shoulder following arthroscopy. He opined that appellant could not return to his date-of-injury position, but could perform modified duty eight hours a day with restrictions of lifting no more than 15 pounds and no work above shoulder level.

² The initial statement of accepted facts (SOAF) dated July 11, 2012 listed prior employment injuries. On May 20, 2009 File No. xxxxxx633, appellant sustained bilateral edema, bilateral hammer toe, bilateral contusion of the toes, and bilateral deformities of the ankle and foot. In his January 1, 2010 File No. xxxxxx935, appellant sustained sprain of the right supraspinatus tendon in the shoulder and upper arm. In a September 19, 2011 File No. xxxxxx802, OWCP accepted AC sprain bilaterally, respectively.

Dr. Ghazal reviewed appellant's August 2, 2013 left shoulder MRI scan on September 17, 2013 and recommended left shoulder surgery including left shoulder arthroscopy, acromioplasty, labral resection with biceps tenodesis and possible rotator cuff repair.

Appellant reported continued low back symptoms on May 15, 2013. He indicated that he had experienced severe back pain since his injury and had fallen several times. On May 27, 2013 appellant requested treatment for his left shoulder and extreme pain in the lower back.

In a note dated January 22, 2014, Dr. Matiko noted that appellant wished to postpone his approved left shoulder surgery to address his low back and lower extremity conditions.

OWCP referred appellant for vocational rehabilitation services on April 4, 2014. It noted that Dr. Ghazal's report and work restrictions were considered to be the weight of the medical opinion evidence. OWCP authorized training for appellant on June 30, 2014 as a medical/billing coding clerk or hospital admitting clerk. Appellant began training at Four D College on July 23, 2014. He completed his coursework by April 16, 2015 and began his externship on April 23, 2015. Appellant completed the externship on June 19, 2015. Four D College closed on July 14, 2015. He was unable to take the certification test or to obtain his diploma despite completing the medical billing/coding program at Four D College due to the schools closure. OWCP authorized additional training for appellant with U.S. Colleges from September 14 through October 30, 2015 to complete his training in medical billing/coding.

On August 27, 2015 OWCP reassigned appellant to another vocational rehabilitation counselor. The second vocational rehabilitation counselor amended appellant's training plan for two new jobs, safety manager and manager-merchandise, which required Occupational Safety and Health Administration (OSHA) training. Appellant agreed to the new short-term training from OSHA running from September 28 through November 19, 2015 for skills, education, and certification to work in the health and safety fields.

In a letter dated September 24, 2015, OWCP found that the positions of safety manager and manager-merchandise, were within appellant's limitations and directed him to cooperate fully to return to work in a position similar to these. The position of manager-merchandise was classified as sedentary, required two to four years of specific vocational preparation, and was being performed in sufficient numbers to make it reasonably available. Appellant met the specific vocational preparation based on his approximately two years of college, and strong transferable skills in management and related fields. The vocational rehabilitation counselor noted that three of the five positions identified did not require lifting over the shoulder.

Appellant successfully completed his OSHA training program by November 20, 2015 and was scheduled to participate in placement services from November 20, 2015 through February 17, 2016.

OWCP referred appellant for a second opinion evaluation with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, on January 15, 2016. In the SOAF referred to Dr. Einbund, OWCP noted that during the September 19, 2011 employment injury appellant felt a pull in both shoulders and his back. On January 21, 2016 appellant contacted OWCP and requested treatment for his back condition which began with the employment injury.

In his February 25, 2016 report, Dr. Einbund reviewed appellant's history of injury on September 19, 2011 describing pulling in both of appellant's shoulders as well as in his low back. He noted in March 2011 appellant experienced a low back injury and underwent treatment approximately until his September 2011 injury. Appellant reported bilateral shoulder pain and persistent low back pain. Dr. Einbund noted that appellant had two preexisting back injuries. He noted, "I am unaware of the details of these prior injuries, however, there may be some preexisting disability in this regard." Dr. Einbund diagnosed tendinosis of the right shoulder with weakness of the deltoid and shoulder flexors as well as limited range of motion. Based on MRI scan results, appellant's left shoulder conditions included tear of the supraspinatus tendon, and labral tear. Clinical examination demonstrated impingement sign and limited range of motion. Dr. Einbund recommended left shoulder surgery. OWCP asked that Dr. Einbund describe appellant's physical limitation from his work-related and preexisting conditions. Dr. Einbund indicated that appellant could not lift, push, or pull more than 15 pounds and could not reach above shoulder level. He opined that appellant was capable of performing the position of safety manager.

The vocational rehabilitation counselor requested an additional placement period for appellant beginning on March 2, 2016 and OWCP extended his placement period through April 30, 2016.

In a letter dated March 5, 2014, appellant requested further treatment of his back injury. He alleged that his back had worsened and that he experienced severe back spasm on a regular basis.

On April 30, 2016 the vocational rehabilitation counselor opined that appellant's starting salary would be \$15.00 per hour. OWCP completed a memorandum on May 4, 2016 and noted that appellant underwent two one-week sessions to obtain OSHA safety certificates for the vocational goals of safety manager and manager-merchandise. Both of the selected positions were at the sedentary work level. OWCP selected that position of manager-merchandise and noted that this position was consistent with appellant's work restrictions and that no overhead reaching was required based on the labor market surveys. It found that appellant was capable of performing the duties of manager-merchandise, that this position was vocationally suitable, and that the position existed in sufficient numbers in appellant's commuting area. OWCP found that the \$15.00 per hour salary was appropriate.

On May 5, 2016 OWCP proposed to reduce appellant's compensation for wage loss based on the finding that he was not totally disabled and was capable of earning wages as a manager-merchandise at the rate of \$600.00 per week.

Appellant contacted OWCP on May 12, 2016 and indicated that he filed a recurrence of disability (Form CA-2a) in his back claim.³ In a letter dated May 17, 2016, he indicated that his back condition should be recognized as arising in his current claim. Appellant noted that, while he might be capable of performing sedentary work with restrictions, he was currently utilizing medications which caused drowsiness and dizziness due to his chronic back pain. He submitted form reports from Dr. Puri dated January 23, 2012, February 20, March 21, May 2, 30,

³ File No. xxxxxx395.

October 17, November 21, 2012, February 6, and March 11, 2013. Dr. Puri diagnosed lumbar strain, degenerative disc disease in the lumbar spine, and herniated lumbar disc. He indicated that appellant was totally disabled.

By decision dated June 15, 2016, OWCP found that the constructed position of manager-merchandise reasonably represented appellant's wage-earning capacity and reduced his wage-loss compensation benefits effective June 26, 2016. It found that the weight of the medical evidence established that appellant was not totally disabled and that the vocational rehabilitation counselor determined that the position of manager-merchandise was reasonably available and within appellant's physical and vocational abilities.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁵

Section 8115 of FECA⁶ provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁷

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to

⁴ *James M. Frasher*, 53 ECAB 794 (2002); *J.E.*, Docket No. 16-0006 (issued November 16, 2016).

⁵ 20 C.F.R. §§ 10.402 and 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁶ 5 U.S.C. § 8115.

⁷ *Id.*

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson*, *supra* note 5.

perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹⁰

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*¹¹ will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.¹²

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation benefits based on his capacity for earnings in the constructed position of manager-merchandise.

OWCP has the burden of establishing that appellant is capable of performing the duties of the selected position considering his accepted injury-related condition and any preexisting conditions. Appellant has consistently reported low back pain both preexisting and as a result of his September 19, 2011 employment injury. The initial medical records support both bilateral shoulder and a low back conditions. OWCP did not accept or address a back condition resulting from appellant's employment injury on September 19, 2011, but the record is replete with appellant's reports of continuing low back pain.

OWCP procedures instruct that the claims examiner is responsible for determining whether the medical evidence establishes that the claimant is able to perform the selected jobs, taking into consideration medical conditions due to the accepted work-related injury or disease (including those accepted under other claims which may or may not have been doubled/combined with the instant case file), and any preexisting medical conditions.¹³

OWCP based appellant's work restrictions initially on Dr. Ghazal's May 3, 2013 report. While he reviewed appellant's history noting a preexisting lumbar spine injury, and noted that appellant reported that his back was most painful, Dr. Ghazal indicated that he was not

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.1 (February 2011); *John D. Jackson*, *supra* note 5.

¹¹ 5 ECAB 376 (1953).

¹² *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4(b) (June 2013).

addressing this aspect of appellant's claim. This report explicitly excludes discussion of any preexisting back condition and resulting disability and is insufficient to meet OWCP's burden of proof to establish that appellant could perform the constructed position of manager-merchandise.

OWCP then referred appellant for an additional second opinion evaluation with Dr. Einbund, and in the accompanying SOAF noted that during the September 19, 2011 employment injury appellant felt a pull in both shoulders and his back. In his February 25, 2016 report, Dr. Einbund reviewed appellant's history of injury on September 19, 2011 describing pulling in both of appellant's shoulders as well as in his low back. He noted that in March 2011 appellant experienced a low back injury and underwent treatment approximately until his September 19, 2011 employment injury. Appellant reported persistent low back pain to Dr. Einbund. Dr. Einbund noted that appellant had two preexisting back injuries. Although he reported knowledge of these prior injuries, he noted that there could be some preexisting disability in this regard, but not elaborate. OWCP asked that Dr. Einbund describe appellant's physical limitation from his work-related and any preexisting conditions. In response, Dr. Einbund indicated that appellant could not lift, push, or pull more than 15 pounds and could not reach above shoulder level. Dr. Einbund opined that appellant was capable of performing the position. His report does not clearly establish that the work restrictions included appellant's preexisting back conditions and any resulting disability. As such, Dr. Einbund's report is insufficient to meet OWCP's burden of proof.

As OWCP has not submitted sufficient medical evidence to establish the extent of appellant's disability due to his preexisting conditions, OWCP has not met its burden of proof to reduce appellant's wage-loss compensation benefits.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation benefits based on his capacity for earnings in the constructed position of manager-merchandise.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 4, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board